STATE OF MICHIGAN

COURT OF APPEALS

JAYNE M. UBER,

Plaintiff-Appellant,

v

TIG SPECIALTY INSURANCE COMPANY,

Defendant-Appellee,

and

CARE CHOICES,

Intervening Appellee.

UNPUBLISHED
January 31, 2003

No. 232687
Livingston Circuit Court
LC No. 99-017105-NO

Before: Murray, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiff Jayne M. Uber appeals as of right the order granting defendant TIG Specialty Insurance Company's motion for summary disposition and the order denying plaintiff's motion to compel Care Choices to endorse a settlement check and for a declaratory judgment concerning Care Choices' lien. This case arose when plaintiff sustained injuries falling from a horse. Plaintiff filed suit over the accident, and obtained a $2.8 million consent judgment. As part of this consent judgment, the underlying defendants assigned plaintiff their rights against defendant, one of two insurers of the underlying defendants at the time of the accident. Plaintiff, as assignee, sued defendant for indemnity. Care Choices, plaintiff's health care provider, filed a lien seeking to preserve any reimbursement of benefits it paid for plaintiff's care. We affirm.

I.

Plaintiff first argues that the trial court erred when it ruled that, under the terms of the insurance policy, defendant did not have a duty to defend or indemnify the underlying defendants in her lawsuit. We disagree.

A trial court's decision to grant a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo to determine whether the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), "a trial court

considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion" to determine whether a genuine issue regarding any material fact exists. *Id.* at 120. Likewise, a question regarding the interpretation of contractual terms in an insurance policy is a question of law that is reviewed de novo. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998).

Initially, plaintiff argues that defendant should be estopped from changing its arguments or defenses post-litigation. Plaintiff cites *Railway Co v McCarthy*, 96 US 258, 267; 24 L Ed 693 (1877), for the proposition that "[w]here a party gives a reason for his conduct and decision touching any thing involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration." Generally, once an insurer has denied coverage to an insured and stated its defenses, that insurer is estopped from raising new defenses. *SMDA v American Ins Co (On Remand)*, 225 Mich App 635, 695-696; 572 NW2d 686 (1997). In this case, however, defendant asserted that there was no coverage based on the policy terms, thus defendant may still rely on any defenses based on the policy. Further, plaintiff has not established any inconsistencies between defendant's previous assertions and its defenses. Therefore, the trial court's determination in this regard was proper.

Next, plaintiff argues that the trial court erred in concluding that plaintiff's claim was excluded under the policy when there existed a genuine issue of material fact with regard to whether the term "concession" included the horse stable. Again, we disagree. The terms of an insurance contract are interpreted in accordance with their commonly used meaning, and the policy must be enforced according to its terms. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111-112; 595 NW2d 832 (1999). Where the terms of the contract are clear, we will not hold an insurance company liable for a risk it did not assume. *Id.* The trial court found that the allegations in plaintiff's underlying complaint did not even arguably come within defendant's policy coverage. The plain and unambiguous terms of defendant's policy covered concession stands, stores, and boat rentals, but not the riding stable or horseback riding activities. Thus, it is clear that under the plain terms of the insurance contract, defendant did not assume the risk sought by plaintiff in her complaint. *Id*. Accordingly, the trial court's grant of summary disposition to defendant was proper.

II.

Plaintiff also argues that the trial court erred when it ruled that Care Choices' could assert a lien on the settlement proceeds collected by plaintiff. Specifically, plaintiff contends that the policy does not clearly and specifically disavow the make-whole rule, thus plaintiff is entitled to be made whole before reimbursing Care Choices. We disagree. Care Choices provided plaintiff with benefits pursuant to a qualified Employment Retirement Income Security Act (ERISA), 29 USC 1001 *et seq.*, plan. As such, decisions regarding the interpretation of the terms of the plan must be reviewed under a de novo standard unless the benefit plan gives the administrator discretionary authority to construe the terms of the plan, in which case a deferential standard is employed. *Firestone Tire & Rubber Co v Bruch*, 489 US 101, 115; 109 S Ct 948; 103 L Ed 2d 80 (1989).

The "make whole" rule of federal common law, which is cited by both parties, requires that an insured be made whole before an insurer can enforce its right to subrogation under

ERISA, unless there is a clear contractual provision to the contrary. *Copeland Oaks v Haupt*, 209 F3d 811, 813 (CA 6, 2000). The *Copeland Oaks* Court emphasized that the make-whole rule is merely a default rule if the agreement is silent or ambiguous but,

> in order for plan language to conclusively disavow the default rule, it must be specific and clear in establishing *both* a priority to the funds recovered *and* a right to any full or partial recovery. In the absence of such clear and specific language rejecting the make-whole rule – with clarity and specificity ultimately determined by the reviewing court – it is arbitrary and capricious for a plan administrator not to apply the default. [*Id.* (emphasis in original).

In this case, the Care Choices coverage plan unambiguously requires a member to reimburse the plan for "all sums recovered by suit, settlement, or otherwise" for the benefits provided under the plan. Therefore, under the ERISA case law, Care Choices has a right to reimbursement from plaintiff's recovery and is not subject to the default rule. See, e.g., *Waller v Hormel Foods Corp*, 120 F3d 138, 140 (CA 8, 1997) (use of the term "all rights of recovery" sufficient to prevent application of the default rule); *Fields v Farmers Ins Co, Inc*, 18 F3d 831, 835-836 (CA 10, 1994) (use of the term "*any* recovery" sufficient to prevent application of the default rule). Accordingly, the trial court's ruling that Care Choices could assert a lien on the settlement proceeds collected by plaintiff was also proper.[1]

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald

[1] We further note that the holding in *Great-West Life & Annuity Ins Co v Knudson*, 534 US 204; 122 S Ct 708; 151 L Ed 2d 635 (2002) is inapplicable to this case at this time. Based on the facts of this case, Care Choices is only seeking to preserve its lien on appeal and was not a party seeking enforcement of the reimbursement provision in the lower court. Therefore, our holding in this case has no affect on Care Choices' future actions with regard to the enforcement of its reimbursement provision. Rather, our decision is limited to the propriety of Care Choices' lien on plaintiff's settlement proceeds under the contractual language at issue.